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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the
ADMINISTRATIVE LAW COURT
The Honorable Shirley C. Robinson

Appellate Case No. 2020-000837
Case No. 19-ALJ-17-0001-CC

Eighteen Ink, LLC, d/b/a Group Therapy.....Respondent,

v.

South Carolina Department of Revenue.....Respondent,

and

Thomas R. Gottshall, April C. Lucas, Michael Drennan.....Intervenors, Appellants.

BRIEF OF INTERVENORS, APPELLANTS

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AND DRENNAN

March 29, 2021
Columbia, South Carolina

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INTRODUCTION

Licenses and permits to sell alcohol are the property of the State of South Carolina, specifically Respondent South Carolina Department of Revenue (DOR), and thus a privilege "to be enjoyed only so long as the restrictions and conditions governing their continuance are complied with." Kan Enterprises, Inc. v. S.C. Dep't of Rev., 420 S.C. 596, 607, 803 S.E.2d 882, 888 (Ct. App. 2017). As such, an applicant has the burden to demonstrate eligibility based on qualifications, fitness and character, and the suitability of the proposed location to ensure the sale of alcohol does not have a deleterious effect on the community at large. That is *not* what happens in Columbia, South Carolina in the business and hospitality district known as Five Points, where a proliferation of late-night dive bars sell cheap liquor to large crowds of young people, many under legal drinking age, who drink to excess. This raucous night life spills onto the streets of Columbia creating nuisances for neighboring residents and a public safety nightmare for local law enforcement. This contested case hearing before the Administrative Law Court (ALC) is one of several recent protests brought by residents and the Columbia Police Department (CPD) urging the ALC to enforce laws and precedent designed to curb precisely the sort of public harms inflicted by Respondent Eighteen Ink, LLC d/b/a Group Therapy (Group Therapy). The ALC demurred.

Appellants Thomas Gottshall, April Lucas, and Michael Drennan, along with a dozen other neighbors, CPD, and the University of South Carolina, presented law enforcement data, traffic study data, student survey data, and testimony that Group Therapy consumes an inordinate number of police resources and that the ills afflicting the community emanate from Group Therapy specifically and the vicinity surrounding the location. In the parlance of alcohol beverage licensing law, the location is not "suitable" to receive a permit or license for on-premises consumption.

There is a ready and obvious explanation why Group Therapy and other college bars like it in the Five Points district create such an outsized public safety problem in Columbia when other Columbia hospitality districts with a similar density of alcohol permits and licenses do *not* give rise to the same nuisance and criminal behaviors: Group Therapy and its ilk are constitutionally ineligible to receive liquor licenses, but nonetheless have in contravention of constitutional law. Article VIII-A, § 1 of the South Carolina Constitution provides that a liquor license for on-premises consumption can only be granted (in relevant part) to an establishment "engage[d] primarily and substantially in the preparation and serving of meals."

Appellants established these two grounds for denying the permit and license (or were prepared to with record evidence), but the ALC went to extraordinary ends to exclude relevant evidence and ignore overwhelming evidence from neighbors, police, and the State's largest university all pleading that the court follow the facts and apply the law. Regrettably, the ALC's decision here is an abuse of otherwise very broad discretion. Just one example at the outset neatly illustrates the ALC's jaundiced treatment of the facts and severely undermines the credibility of its fact finding here. Just 10 weeks after the contested case hearing, but before the ALC issued a ruling, Appellants moved to reopen the record to consider testimony and body camera footage from two State Law Enforcement Division (SLED) officers called to respond to a brawl that erupted inside Group Therapy and spilled onto the streets of Columbia during an early Saturday morning. The evidence—shocking body camera footage taken by agents who threw themselves into a melee inside Group Therapy—echoed the very problems with violence and disorderly conduct detailed by CPD police chief and protestant W. H. Holbrook. The ALC denied leave to supplement the record in an order claiming the evidence was "cumulative" to evidence already admitted and "will not have any material effect on the outcome of this matter." Indeed, it had no

effect as the ALC dismissed, disparaged, and ignored uncontradicted evidence that Group Therapy burdens law enforcement and creates other alcohol-related harms that render the location unsuitable. Likewise with Appellants' claim that Group Therapy is constitutionally ineligible to receive a liquor license because it is not primarily and substantially engaged in meal preparation and service, the ALC avoided the substantive question by suppressing evidence that Group Therapy is not, in fact, so engaged.

The Final Order is deeply flawed. For reasons that follow, the Court should reverse.

STATEMENT OF THE ISSUES

I. Whether the ALC erroneously excluded and ignored the burden to law enforcement and other alcohol-related harms flowing directly from the applicant's establishment?

II. Whether precedent requires an ALC to consider the suitability of the vicinity surrounding a proposed location?

III. Whether evidence that a bar is not, in fact, primarily and substantially engaged in the service of meals as required by the South Carolina Constitution should be considered in a licensure proceeding that adjudicates an applicant's eligibility to obtain a liquor by the drink license?

STATEMENT OF THE CASE

On July 17, 2018, Group Therapy filed a renewal application for an on-premises beer and wine permit and restaurant liquor-by-the-drink[1] license for its location at 2107 Greene Street in Five Points business and hospitality district. R. App. 1. Fifteen residents[2] from neighborhoods adjacent to Five Points filed timely public protests and, on December 4, 2018, DOR denied the

[1] Liquor by the drink is "a drink poured from a container of alcoholic liquor, without regard to the size of the container for consumption on the premises of a [licensed] business[.]" S.C. Code Ann. § 61-6-20(1)(b).

[2] Protests were filed by James M. Daniel, III, Michael Drennan, Thomas Gottshall, Susalee Lamb, William Lamb, Patricia Wood, William Hrushesky, Karen Belser, Polly Morrison, Nancy White, April Lucas, John Stucker, Vivian Armstead, Olufemi Olulenu, and Beth Richardson. R. App. 1.

applications based on timely receipt of public protests. R. App. 1.[3] On January 2, 2019, Group Therapy requested a contested case hearing. R. App. 1.

On February 4, 2019, the ALC granted (without objection) leave for Appellants to intervene. R. App. 2. Appellants' protests argued (1) Group Therapy is not engaged primarily and substantially in the preparation and service of meals as required by Article VIII-A, § 1 of the state Constitution and (2) the proposed location is not "suitable" for continued on-premises service and consumption of alcohol. R. App. 575.

On September 27, 2019, DOR added Chief Holbrook to the list of protestants based on a valid protest received on September 23, 2019. R. App. 2. Chief Holbrook's protest urged denial of the permit and license because of (1) public intoxication near the location, (2) a large volume of calls for service at the location, (3) constant law enforcement problems at or near the location, and (4) congregating and loitering near the location. R. App. 248–79.

On December 9, 2019, DOR amended its prehearing statement to inform the ALC the Department no longer considered Group Therapy suitable for renewal on account of a September 15, 2019 citation issued by SLED for permitting a criminal act on the premises in violation of South Code § 61-4-580(5) and Revenue Procedure 13-2. R. App. 2.

On December 19, 2019, DOR added USC as a valid public protestant based on a protest filed that day. R. App. 2. USC's protest urged denial of the license based on public safety concerns and the impact of Five Points nightlife on students. See R. App. 363.

The ALC held a contested case hearing on February 11 and 12, 2020. Prior to taking testimony, the court granted Group Therapy's motion to exclude evidence Appellants intended to

[3] See also S.C. Code Ann. §§ 61-4-525(B) (receipt of timely protest precludes DOR from issuing permit, requires forwarding the file to the ALC) & 61-6-1825 (same).

introduce concerning Group Therapy's preparation and sale of meals. R. App. 61–63. Thereafter, the ALC heard testimony from seven witnesses, including Group Therapy owner Steve Taneyhill, Chief Holbrook, a SLED agent, a public safety director at the South Carolina Department of Transportation (DOT), a USC administrator, and two residents from neighborhoods adjacent to Five Points. At the close of the hearing, the ALC took the matter under advisement.

On March 6, 2020, Appellants moved to reopen and supplement the record with new evidence concerning a brawl that broke out inside Group Therapy the early morning of Saturday, February 29, 2020. R. App. 541–56.

On April 23, 2020, the ALC denied the motion. R. App. 19–21.

On April 29, 2020, the ALC entered a Final Order (R. App. 1–18) holding the location was suitable for permitting and licensure and that Appellants could not oppose the license based on the constitutional meal requirement. A timely appeal was noticed on May 26, 2020. The Court has jurisdiction pursuant to South Carolina Code § 1-23-610(A)(1).

FACTUAL BACKGROUND

Group Therapy is a bar/nightclub that sells a large quantity of cheap alcohol

Steve Taneyhill is the general manager and co-owner of Group Therapy since 2016. R. App. 111–12. Group Therapy is located in Five Points at the corner of Greene and Harden Streets. R. App. 112–13. Tuesday through Thursday, it opens at 4:30 p.m. and stays open until after 2:00 a.m. R. App. 113. Saturday and Sunday, it "usually" opens in the afternoon and stays open until after 2:00 a.m. R. App. 113. The bar serves beer, wine and liquor until 2:00 a.m. R. App. 124. The bar claims its cheapest drink is $3 (compare R. App. 127), but photographic evidence of a drink special board inside the bar indicates otherwise. With R. App. 137–40, 428 & 476 (photo of drink special for $2). The bar employs approximately 16 people. R. App. 112. Ten of those individuals—

more than two thirds of its employees—are bouncers, or what Taneyhill calls "door guys." R. App. 118, 141. Asked, "what do the other six employees do?", Taneyhill explained: "Bartenders. … And then the cook, I had one cook." R. App. 136. He has no dishwashers. See R. App. 136–37. Indeed, throughout his testimony, Taneyhill inadvertently abandoned his establishment's official litigation position that it is, in fact, a "restaurant" and instead called it what it is: "the bar". See R. App. 192.

Torrickory Outing is paid by Group Therapy to disc jockey (DJ) from time to time. R. App. 88–89, 93–94. When he does, the bar sets up "a dance-floor area" either inside in the back of the bar or in an open-air area out back. R. App. 94–96. As he explained, it "depends on the night" because "it's a large venue with a speaker system throughout" and "the entire thing [meaning the entire bar] is pretty much a dance floor[.]" R. App. 95. By Outing's description, when he is DJing it will "get a little dense" with somewhere between 50–75 or 150–200 people depending on which part of the bar has the dance floor set up. R. App. 97. For atmosphere, Group Therapy has "a light show", which Outing touted as a benefit, explaining "You know at any club, you know, there'll be areas that are dark." See R. App. 98.

The bar's total occupancy is 240 people. R. App. 145. Often, at night, the bar will reach its occupancy. R. App. 146. When that happens, a line forms on the sidewalk down Harden Street. R. App. 146–47. On Thursday, Friday, and Saturday nights, Group Therapy hires a disc jockey (DJ) or a band that sets up at 9:30 p.m. and plays until 1:30 a.m., sometimes later. R. App. 149–51. Taneyhill hires music because it brings in a crowd. R. App. 151–52. On any given night, Taneyhill estimates it would be reasonable for each patron to have approximately three drinks—roughly 750 drinks over the course of the evening. See R. App. 178. But according to a point-of-sale (POS) report for April 2018 to April 2019, Group Therapy served 186,403 liquor drinks and 65,860

beers—a total number of 252,263 alcoholic beverages or 691 drinks *per calendar day*. See R. App. 183–88 & 477–78. Put differently, if Taneyhill filled the bar to capacity every single night (he does not (see R. App. 188), each guest would have to drink his or her three-drink maximum to sell the quantity of alcohol his POS report evidences. Nevertheless, Taneyhill claimed his staff never overserves patrons. See R. App. 188–89. The business is profitable. R. App. 152.

Violence is a concern at Group Therapy

Group Therapy's door guys frisk patrons for guns and knives when they enter. R. App. 159. Taneyhill concedes he has never been to a restaurant where he was frisked before entering. R. App. 159. When the bar seizes weapons or has a security incident it is memorialized on a "pad." R. App. 160. Group Therapy did not produce the pad in discovery. See R. App. 160–63. Likewise, the bar failed to produce video surveillance in discovery (see R. App. 163–67 ("… Q. … I've never seen any footage from inside your location for a Thursday, a Friday, or a Saturday night. You got anything, any video to that effect? A. Should be. Q. We asked for it. A. We didn't have this here. …")), causing Appellants to move for spoliation sanctions. See R. App. 612–93. That motion was mooted by the ALC's decision to exclude all evidence concerning the bar's meal preparation and service. See R. App. 61–63.

On "numerous" occasions, Group Therapy has limited door access to patrons with either a student or military ID. R. App. 153. Taneyhill explained the bar did this at the request of CPD due to concerns about "some of the things that were going [on] inside with the crowd." R. App. 153. This happened "many times." R. App. 154. Pressed to explain precisely when this occurred, Taneyhill was evasive to the point that even the ALC interjected, "I'm listing to -- Mr. Taneyhill has not really answered the question. He's been a little -- kind of vague with most of the answers in response to this line of questioning." R. App. 155. Eventually, Taneyhill mustered an unclear

explanation, but agreed the effect of this policy was to lower the average crowd age to university age patrons. See R. App. 156–57. Pressed further still, he confessed that CPD was encouraging him to take these steps "to control what [CPD] thought was a problem crowd[,]" specifically "large gang activity[.]" R. App. 157–58. As another example of measures requested by law enforcement, Group Therapy was asked to remove a DJ playing music that police suspected was attracting gang activity at the establishment. R. App. 158.

When he took the stand, Chief Holbrook explained that he filed a public protest to the bar's permit and license based on an analysis by CPD that tied a large number of calls for police services specifically to Group Therapy. See R. App. 248–51, 260–64. For instance, in one 12-month period, CPD was called to the location 43 times, 38 of which were "directly associated" with the business, meaning there was a direct nexus to the bar. R. App. 264–65, 273–74. CPD found there "was high call volume and generally related to alcohol-related offenses." R. App. 270. For example, during that one-year period, CPD was called to respond to six building alarms, 11 fights and civil disturbances, two noise violations, nine fake IDs, five possessions of alcohol by persons under the age of 21, one extended-hour permit violation, and one SLED/DOR violation. R. App. 273–74. Other police data corroborated the findings CPD appended to its public protest.

For example, data of crime reports at 2107 Greene Street (Group Therapy's location), the 2100 block of Greene Street, and the 800 block of Harden Street from 2014 forward evidenced a huge uptick in charges in 2018 both as to Group Therapy's location *and* the block on which it resides. R. App. 274–78 & 479–84. There were 16 offenses at Group Therapy in 2018, but an additional 58 offenses tied to the block where it resides. R. App. 479–84. The most prevalent offenses include disorderly conduct, underage consumption, underage possession of alcohol, and resisting arrest, just to name a few. R. App. 479–84. In 2019, there were 19 offenses tied to Group

Therapy's location and another 88 on the block where it is located. R. App. 279–80, 479–84. Notably, the incidents tied directly to the location are *separate and in addition to* the charges tied to the immediate vicinity around it—i.e., the 800 block of Harden and 2100 block of Greene. R. App. 278–79.

Underage patrons and other anti-social and criminal behavior is a problem at Group Therapy

Underage patrons are also a problem at Group Therapy. Taneyhill claimed his bar only served an underage patron one time or, at least, he was only ticketed one time. See R. App. 189–90. Taneyhill claimed the bar had one ID-checking device, but *two* public entrances. R. App. 141. He also claimed persons under the age of 21 are given limited access to the bar but was unable to articulate his policy as to when underaged persons are turned away. See R. App. 141–43 ("Depends."). Eventually, he admitted there is no policy:

Q. All right. You're the manager at Group Therapy, right?

A. Yes, general manager.

Q. You're the guy in charge.

A. I am.

Q. You tell your people what to do?

A. Yeah.

Q. When you tell them what to do, do they follow your instructions?

A. I would hope so.

Q. Okay. What have you told your people in terms of what time of day or night should you start turning away underage patrons?

A. I haven't told them a specific time.

R. App. 144. This is problematic because, according to Taneyhill, once an underage patron is admitted access to the bar, his bartenders assume the patron has been IDed and is of legal drinking age. R. App. 190.

Thousands of young patrons flood Five Points late at night drinking to excess and cause tumult in the district and the surrounding neighborhoods

Special Agent (S/A) Kirkland Jordan routinely patrols Five Points with SLED's alcohol enforcement team. On Thursday, Friday, and Saturday night in Five Points when colleges are in session, Five Points is "packed with underage." R. App. 231. "Most nights all of Five Points is pretty jammed packed with college kids." R. App. 234. Underage drinking is a "huge problem" in the hospitality district due to the ubiquity of fake IDs. R. App. 231. On the streets, people congregate and loiter and line the sidewalks waiting for entry into various bars, including Group Therapy. R. App. 232–33. Jordan has witnessed intoxicated people passed out on the street and urinating on the sides of buildings. R. App. 232–33. By the end of the night, she "see[s] so many people staggering home, you know, I'm afraid they're not going to get home okay, you know." R. App. 239. Likewise, she sees "[l]ots of fights. Typically, when the bars will dump at about 1:45 to 2:00 a.m.[.]" App. 233. Sometimes there are so many people, she cannot even see the sidewalk. See App. 233–34. Jordan does not believe it is safe when the streets are that crowded and that more law enforcement officers are needed to keep Five Points safe. App. 234, 238. Chief Holbrook echoed these concerns, explaining that at least four nights each week, a large group of predominately young adults consume alcohol in large quantities, "oftentimes being overserved." R. App. 270–71. This creates a "very vulnerable population that requires extraordinary police presence to protect" from "individuals that have nefarious intent to victimize this vulnerable population." R. App. 271. Asked why Five Points patrons were "vulnerable," the Chief explained they were "primarily students that are highly intoxicated" as they travel to and from their

residences and Five Points. R. App. 271. Accordingly, these overserved individuals fall victim to robberies, aggravated assaults, simple assaults, fights, and occasionally gunfire. R. App. 271–72.

Even Taneyhill agreed there is a public safety problem with violence and other alcohol-induced behaviors. He agreed sidewalks are crowded Thursday, Friday, and Saturday nights (R. App. 148, 167); people loiter (R. App. 176); and it is not uncommon to see people who have overconsumed alcohol on the street. R. App. 149. Taneyhill recalled "a few" fights just outside Group Therapy's doors. R. App. 167–68. As Taneyhill explained, "[o]nce you put everybody out in all the streets, then you're going to have issues in the street." R. App. 169. In his view, the problem then is not enough CPD officers. R. App. 169. Candidly, he explained:

> Q. Would -- do you believe we need more police resources in Five Points?
>
> A. At certain times, yes.

R. App. (Hr'g Tr. 146).[4] After evading repeatedly, Taneyhill again showed candor, sharing his own grave concerns about public safety in Five Points, the very concerns at issue in this case:

> Q. Do you think it's fair for the community to have to pay more in police to make it safe in Five Points ---
>
> A. I think it is safe *at times*. But I think a few more CPD would make it safer, yes.
>
> Q. You think it's unsafe at times too?
>
> A. You can get a lot of people down there at one time.
>
> Q. I agree. The things you've seen down there when there's a lot of people – you've seen fights, we've talked about that.
>
> A. (Nods head affirmatively).
>
> Q. Is that a yes?

[4] While he wants more police in Five Points, Taneyhill would not say whether he was willing to pay more in taxes to fund that additional commitment of public resources. See R. App. (Hr'g Tr. 149–51).

A. Yes.

Q. Okay. You've seen public intoxication?

A. Yes.

Q. You've seen underage consumption?

A. Seen it?

Q. Are you aware of it?

A. Oh, yeah.

Q. Do you ---

A. I mean, it's not hard to get a fake ID.

Q. Do you agree with me that that's a fairly common occurrence?

A. I mean, it is a college town.

R. App. 174. Taneyhill even acknowledged neighbor concerns that students walking back to their houses engage in nuisance behavior like "throwing up or something" that disturbs neighbors. R. App. 175.

While Taneyhill claims to want more CPD officers in Five Points, CPD already maintains a huge police presence in the district and Chief Holbrook does not have any more officers to send. On a Thursday, Friday, Saturday night, CPD deploys between 12 and 40 officers in Five Points to maintain order. R. App. 260–61. In addition to CPD, the SLED detail in Five Points fluctuates from eight to 12 officers on any given night. R. App. 234–35. Sometimes USC police and the Department of Probation, Pardons, and Parole (PPP) send officers as well. R. App. 235–36, 261–62. To put this police presence in perspective, at the exact same time CPD has 12 to 40 officers in Five Points, another Columbia hospitality district just a couple miles away (The Vista) that also has a high concentration of restaurants that sell alcohol for on-premises consumption is typically

patrolled by just two to four CPD officers. R. App. 262–63. Similarly, Taneyhill sought to bolster his credibility with irrelevant testimony about a charity chili cookoff event that brought approximately 3,000 people to Five Points one day around noon, but that daytime event—an event organized around a meal—required just three police officers to maintain order. See R. App. 169–70. Put differently, nightlife in Five Points, and the alcohol-related harms that flow from it, is categorically different from anywhere else in the City of Columbia, including other hospitality districts with large numbers of locations for on-premises alcohol consumption.

Five Points nightlife causes other alcohol-related harms to the community

Beyond violence, the ALC heard extensive, uncontradicted evidence concerning a proliferation of alcohol-related harms caused by Five Points nightlife, specifically a huge number of pedestrian and bicycle vehicle collisions in the vicinity, disturbances for neighbors, and harms to students.

Rob Perry is the Director of Traffic Engineering for the South Carolina Department of Transportation (DOT), responsible for traffic design, operations, management and safety. R. App. 314–15. In furtherance of a legislative mandate from the General Assembly that DOT use a data-driven approach to identify potential safety projects, the transportation agency audited Department of Public Safety data from 2013 to 2017 reporting fatal or serious pedestrian and bicyclist collisions and mapped those incidents on the State's roadways. R. App. 315–20, 323–24. When roadways are flagged by the audit, DOT considers measures like adding sidewalks, crosswalks, re-timing signals, and other countermeasures designed to reduce crashes. R. App. 325. The top 10 non-motorized safety projects identified by DOT reflect the agency's top funding priorities based on the number of serious collisions on a particular segment of road. R. App. 319–20. Perry explained that the top priority was Harden Street from Blossom to Gervais Streets—the main artery

through Five Points that runs adjacent, north to south, to Group Therapy—based on a methodology that made an "apples-to-apples comparison" by dividing the total number of pedestrian and bicycle collisions by the length of the route calculate the "rate" of total collisions per mile. R. App. 320–22. Harden Street through Five Points had a rate of 27.3—far more than any other segment of road in South Carolina. R. App. 323. The tenth most dangerous segment of road is on Devine Street, another major Five Points artery, just a few blocks south of Group Therapy. R. App. 322–326.

Vivian Armstead lives on Oak Street approximately four blocks from Five Points, in the Martin Luther King Lower Waverly neighborhood. R. App. 381–82. When walking from her neighborhood west toward Five Points, Group Therapy is the second establishment you pass. R. App. 382. Armstrong protested Group Therapy's permit and license on her own behalf and on behalf of her neighborhood association because of "a lot" of "overflow" foot traffic of "drunk students" causing problems from the neighborhood. R. App. 382–83. Armstrong, a resident of the MLK neighborhood for 15 years, explained her neighborhood has had an influx of student rental housing and she and her neighbors routinely observe students walking down to Five Points: "So they're first stop is usually Group Therapy and then they continue on down. And then they have to come back. And that's when the issue occurs is on their way back a lot of the time." R. App. 385. These problems include parking problems, littering, loud noise at night, drunk trespassers, and intoxicated students passing out in MLK park. R. App. 383–85, 387; see also R. App. 388–91 (more examples of alcohol-induced nuisance behaviors). Pressed to explain the nature of the noise, Armstead was emphatic: "Not loud noises that they're doing anything, they're just drunk, so they're talking loud and they're laughing and they're -- and people are in their homes and they hear this and they call the neighborhood president." R. App. 387; see also R. App. 390 ("…I don't know if they're all students or not. But young people that tend to get too drunk to get up the hill

or to find their cars that end up in the park late at night."). Further, in testimony reminiscent of Holbrook's testimony about predatory crime drawn to Five Points, Armstead reported on "a few occasions [when] we've seen young coeds walking alone and inebriated. And notice someone following them or guys trying to talk to them, do you need a ride or you -- and, you know, and seeing [her and her neighbors] sometimes deters that." R. App. 385.

As president of the neighborhood association, the volume of complaints Armstead receives arising from student nuisance behavior is "constant [ ] particularly from the people that live directly in front of the park, directly on Greene Street, which is the same street that Group Therapy is that leads into Harden." R. App. 386. When the bars are busy, parking and speeding become a problem in Armstead's neighborhood, as do crowds. See R. App. 395–96. Armstead acknowledged Group Therapy was not the only bar in Five Points, but that the area is saturated with watering holes for a younger crowd; "But, like I said, Group Therapy is not the only watering hole that they're aspiring to reach. It just it is the closest one to the MLK neighborhood where we can actually see them coming in and out or see them on the sidewalks as they come out and come toward the neighborhood." See R. App. 390, 392–93. The neighborhood has raised the issue with city code enforcement its representative on city council. R. App. 386. These problems have also caused the neighborhood to request "more presence" from CPD south region. R. App. 386–87. Her neighborhood was not always this way—"it used to be very quiet and peaceful, you know." R. App. 396–97. But in her experience,

> The patrons of the bars are having an impact on the peace and tranquility of our community. It's having an impact on how people feel safe, you know, with knowing who is roaming around in the community. Same people that you know are obviously drunk to the point of them throwing up or falling down. Those types of concerns. And being concerned about the young people. Like I said, there have been nights that we've sat out there because we watched a young girl -- you know, a young lady walking, you know, by herself or with friends who got mad and left her and she has no idea where she's at and there some guys trying to say they're

> helping her, you know, or do you want a ride. So it's caused more concern from the community about what our community looks like and feels like.

R. App. 400–01.

Similarly, protestant and Intervenor Michael Drennan testified that from his home in the Shandon neighborhood adjacent to the south, alcohol nuisance behaviors likewise flow out of Five Points. See R. App. 418–24. Drennan and his husband (they have two 11-year-old children) purchased their home to be within walking distance of USC and in proximity to the Five Points business and hospitality district. R. App. 418. Drennan observed that the density of establishments that sell alcohol for on-premises consumption in Five Points is "egregiously high." R. App. 418–19. During his four late-night trips down to Five Points, Drennan has witnessed general "disorder" and "pandemonium"—specifically, young people vomiting, bleeding, yelling, crying, and generally large crowds of hundreds to perhaps thousands of young people on the city streets. See R. App. 419–23. The impact on the Shandon neighborhood has been noticeable. Drennan does not recall Five Points being a nuisance when he purchased his home in 2004, but starting around 2007–08, he noticed higher incidents of alcohol fueled disturbances from students partying and migrating to and from Five Points. See R. App. 437–39.

Drennan visited Group Therapy on two occasions. On the first occasion, he and Appellant Tom Gottshall waited for entry outside the bar with approximately 40 other people sometime near midnight. See R. App. 424. That evening, the bar was frisking and visually carding patrons prior to entry but did not frisk Drennan or Gottshall. R. App. 424–25. The other occasion Drennan visited Group Therapy, patrons were simply "waved directly into the bar without being carded" and Drennan witnessed at least 20 people enter over a period of 20 minutes without being carded. R. App. 425–26. Once inside, he observed a large crowd listening to loud music. R. App. 426–27.

Photos Drennan took from inside the bar depict patrons drinking, congregating, and dancing, but no meals beings served or eaten. See R. App. 427–34 & 476, 518–19.

The overconsumption of cheap liquor also has a measurable impact on the young people patronizing Group Therapy and other Five Points bars, as measured by survey data captured by USC administrators responsible for student wellbeing on campus. See R. App. 338–61 & 513–16. USC has almost 25,000 undergraduates, approximately half of whom are under the age of 21. See R. App. 345. Each year for at least the last five years, the student population has grown. See R. App. 345–46. Presently, USC attracts approximately 6,000 freshmen that cannot all be housed on campus. See R. App. 346. Likewise, with sophomores, juniors, and seniors (and graduate students), many of whom seek housing in the neighborhoods adjacent to Five Points. See R. App. 346.

Alcohol abuse is a problem for this student population. As USC Vice President for Student Engagement and Dean of Students Mark Shook explained, "[w]hat we're seeing on campus and nationally in terms of the rise in student anxiety and the rise in student depression, the rise in student suicidal ideation and those ties to some of those characteristics tied to high risk and high binged drinking." R. App. 352. The university defines binge drinking as four or more drinks for a female or five or more for a male over the course of two hours. R. App. 353. USC tracks and measures alcohol use by undergraduate students using its Alcohol Edu survey, which matches self-reported data by USC freshmen against national data collected using the same methodology in 550 schools nationwide. See R. App. 353–56. The university has collected this data since 2012, and it finds USC undergraduate alcohol habits to be among the most troubling when measured against peer SEC institutions and the national average. See R. App. 356–57. "And as a matter of fact," Shook explained, "we're significantly higher when you're looking at heavy and problematic drinking. In fact, we're twice the national stat in terms of your problematic drinking, which is eight

or ten-plus drinks in a two week period for men -- ten or plus drinks for men, eight or plus for women." R. App. 357. The types of high-risk drinking behaviors that USC students report engaging in activities like pre-gaming, shots, and chugging, among others, while reporting consequences that include hangovers, blackouts, and adverse academic consequences. R. App. 359–60. For example, in 2016 alone, the number of USC students transported to the hospital due to alcohol intoxication doubled. See R. App. 343. Notably, during the 2017–18 survey—the same year Chief Holbrook noted a dramatic increase in crime at Group Therapy—42 percent of USC respondents to the Alcohol EDU survey reported drinking in a "bar or nightclub" in the last two weeks versus other common locations like a fraternity/sorority house, their own home, outdoors, a car, or a restaurant. R. App. 360–61; see also R. App. 513–16 (the Alcohol EDU data).

USC protested Group Therapy's application after conferring with the university's police chief, its fraternity and sorority life office, and its administrators and identifying the same public safety concerns Chief Holbrook identified. See R. App. 340–42. USC made this determination using a four-prong analysis of (1) student alcohol use data, (2) the nature of the establishment (i.e., bar v. restaurant), (3) social media targeting of students and promotion of overconsumption, and (4) citations and law enforcement input. See R. App. 342–45. In considering these categories, USC found that two of its students in 2018 reported having the last drink they remember at Group Therapy before waking up in a hospital for overconsumption. See R. App. 347. However, the university's greatest concern with Group Therapy stemmed from the CPD call-for-service and crime data—the same data Holbrook presented to the ALC. See R. App. 350–51. Shook explained, "[o]ur students know that they can get in [to Five Points bars] with a crappy IDs and they can take a ten dollar bill down there and get substantive amounts of alcohol." R. App. 362. While acknowledging that crime in Five Points is not solely attributable to Group Therapy, Shook

explained the university was "seeing problems escalate" in Five Points, thus prompting its intervention to attempt to curb bar culture. See R. App. 361.

An underage Group Therapy DJ was caught drinking alcohol and smoking marijuana in a back office during bar hours

On September 16, 2019, SLED was conducting a routine inventory check in Group Therapy's storage area when agents smelled burning marijuana. R. App. 206–07. The agents identified the source of the odor as a locked office in a non-public portion of the bar with an "employees only" sign on the door. See R. App. 208–09. SLED discovered Outing and three others and cited Outing for possession of a small amount of marijuana. R. App. 209–11. The bar's manager on duty told S/A Jordan none of the individuals in the office were employees and they likely snuck in. R. App. 210–11. On September 24, 2019, SLED returned with a warrant for video of that night and, after reviewing the video and recording it on body camera, determined Group Therapy personnel knew Outing and his female friend were in the backroom, let them into the office alone, and smelled marijuana being smoked in the office prior to SLED's arrival. See R. App. 211–23 & 540 ("Q. And what was his explanation for having got into the office? A. He said that he though they snuck in. Q. All right. Does that appear to be the case by viewing this video? A. It does not.").[5]

On the night in question, Outing was not 21 years old. R. App. 105. That night, he claims, he "was acknowledged at the door by the door guy," and "went to the dance floor." R. App. 106. Then, he explained,

> My lady friend got a couple of drinks. And I asked her for some, because that was, you know, a personal thing. I asked her, she gave to me. Then I decided that it was

[5] Curiously, the bar's manager left a thumb drive that was supposed to have the video evidence responsive to the search warrant already downloaded, but when SLED accessed the drive, there was only five seconds of video footage (R. App. 212, 223–24)—a problem reminiscent of Group Therapy's purported inability to produce video to Appellants in discovery.

> time to leave, went to the office to go get my bag and that's when the situation happened.

R. App. 107. Outing claimed he left his bookbag in the back office a few days earlier and went to retrieve it with his female friend. R. App. 84–85, 89. While they were in the back room, two other individuals Outing claimed not to know also entered the office. R. App. 90, 101. When he testified, he claimed no one at Group Therapy knew he and three others were in the back room but conceded one of the four individuals was smoking marijuana when SLED knocked on the door. See R. App. 84–88, 90. Outing claims his memory about that night was a little hazy in part because he consumed "maybe two" drinks. See R. App. 104. He was given PTI for the citation he received. See R. App. 86–87. Group Therapy also received a citation (R. App. 226), but not before Taneyhill urged SLED not to cite his bar, but just cite Outing instead. See R. App. 226–27.

That night, S/A Jordan did a full inspection of the bar. R. App. 228. As is typically the case, it was "pretty packed full of patrons to the point where we're kind of having to elbow a little bit to walk past people[.]" R. App. 228. After entering from Green Street and walking past a long bar, "there's an eating area to the left and there's typically not many people over there. Everyone's kind of over where the music is and the bar." R. App. 228. Most people have drinks in their hands. R. App. 228–29. Jordan witnesses intoxicated patrons—people slouched over or visibly inebriated. R. App. 229. The music is loud; there is no quiet conversation. R. App. 229–30. At the time of the contested case hearing, Jordan had not witnessed any fights inside Group Therapy but had broken up "a couple" in the vicinity of Harden and Greene Streets. R. App. 230.

Post-hearing (pre-decision) brawl at Group Therapy broken up by SLED and captured on body camera

During the early morning hours of Saturday, February 29, 2020, SLED agents responded to a fight inside Group Therapy as it spilled onto the Columbia streets. At approximately 1:44 a.m.

that morning, Jordan was on patrol in Five Points near the fountain when two individuals approached and stated there was a fight while gesturing toward Group Therapy. See R. App. 549. Upon arriving on the scene, Jordan observed several groups of individuals were fighting in the middle of Greene Street. R. App. 549. Jordan recognized one of the individuals attempting to break up the fight as Group Therapy's manager Fabian Ludwig. R. App. 549. Jordan and other SLED agents followed a group of individuals walking toward the front door to Group Therapy. R. App. 550. Several of those individuals pushed their way inside Group Therapy, whereupon Jordan and her colleagues made their way inside and proceed to break up a large fight taking place next to the bar. R. App. 550.

While attempting to stop the fight, someone shouted that gun shots were fired outside the bar, causing Jordan and the other SLED agents to leave Group Therapy and pursue the shots to the corner of Greene Street and Pavillion Avenue, which is in sight of Group Therapy. R. App. 550. A witness stated the shots were fired from a black Nissan. R. App. 550. No arrests were made because, by the time agents returned to Group Therapy, the individuals responsible for fighting had left the scene. R. App. 550. Joran was informed by Ludwig that the fight started inside Group Therapy and the individuals responsible were kicked out of the bar and then proceeded to fight in the street. R. App. 550. Jordan and her colleague—S/A James Tallon, III, who also responded to the scene—both recorded body camera footage of the incident depicting the dangerous, chaotic events described in their affidavits to the ALC. R. App. 550, 552 & 555–56.

Post-hearing proceedings and the Final Order

Ten days after the contested case hearing, Appellants filed their proffer. Appellants' proffer explains they are prepared to establish the following facts concerning whether Group Therapy is

primarily and substantially engaged in the restaurant business. Had Appellants been permitted by the ALC to present evidence on the issue, the evidence would have shown:

1. When Drennan and Gottshall visited Group Therapy, neither saw anyone was eating a meal; instead, the witnessed drinking, milling around the bar, and dancing;
2. Taneyhill testified at his deposition he employs approximately 16 people—10 working security, six bartenders, and one cook; but would have conceded he employs no dishwashers, waiters/waitresses, or hosts/hostesses;
3. Tammy Young, an ABL supervisor for DOR would have testified that when SLED conducts a license or re-license inspection, it uses a checklist to see whether certain statutory criteria are met, but neither SLED nor DOR make any inquiry to determine whether an establishment is, in fact, engaged in the preparation or service of meals or to the extent of that engagement;
4. Young would have confirmed no such inquiry was made as to Group Therapy;
5. In discovery, Group Therapy furnished two reports from its electronic point-of-sale (POS) system.
6. The first POS report (GROUP_000426) covers December 1, 2018 to February 28, 2019 and evidences that 84.9 percent of all Group Therapy sales are for alcohol;
7. Just 6,406 transactions are labeled as "food", which represent 13.5 percent of the bar's total sales in dollars;
8. Of the 55,613 unique alcohol transactions in this POS report, 42,135 are under the category "liquor", which represents 66.2 percent of the bar's total sales in dollars;

9. Likewise, a second POS report (GROUP_000490–GROUP_000491), covers the period of April 16, 2018 to April 16, 2019 and evidences that 87.3 percent of all Group Therapy sales are for alcohol;

10. Just 25,158 transactions are labeled "food", representing 11.2 percent of total sales;

11. Of the 252,263 unique alcohol transactions in this POS report, 186,403 are labeled "liquor", which represents 66.9 percent of the bar's total sales;

12. Taneyhill, testified during his deposition that these POS reports were generated around April 11 and 16, 2019 to respond to discovery, but that he does not use these reports as owner and manager (see R. App. 657–60 & 668);

13. Instead, Taneyhill "keep[s] everything written[,]" meaning he uses a paper folder system with receipts to track his business's sales and at least "some" of these records are stored at Group Therapy but were never produced in discovery as requested (see R. App. 660–62);

14. Taneyhill testified that he "hope[d]" the POS reports are accurate, but conceded, "I guess I don't know that." (see R. App. 667);

15. Taneyhill and/or Young, would likely testify that Group Therapy submits monthly excise tax reports to DOR that purport to report the bar's gross monthly liquor sales;

16. Some of these DOR reports overlap with the time period covered by the POS report marked as GROUP_000426—i.e., December 2018 through February 2019; and

17. Comparing Group Therapy's liquor sales as recorded by its POS system (GROUP_000426) to its DOR Liquor by the Drink Summary Reports (DOR 069–

DOR 071)[6] for the same period, the bar underreported its gross liquor sales by almost $55,000 during this three-month period.

R. App. 557–60.

Also, prior to the ALC issuing the Final Order, Appellants supplemented the record with a proffer concerning meal preparation and service (see R. App. 557–60) and the SLED testimony and body camera footage. See R. App. 552 & 556. By Order dated April 23, 2020, the ALC denied the motion to supplement the record and declined to consider the SLED testimony and video concerning the brawl inside Group Therapy, claiming "it is cumulative to that which has already been admitted and will not have any material effect on the outcome of this matter." R. App. 20.

On April 29, 2020, the ALC issued a Final Order granting the permit and license. R. App. 1–18. This appeal followed.

STANDARD OF REVIEW

The final order of an administrative law court (ALC) is reviewed for findings, conclusions, or decisions that prejudice substantive rights and are (a) in violation of constitutional or statutory provisions, (b) in excess of statutory authority of the agency, (c) made upon unlawful procedure, (d) affected by other error of law, (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or (f) are arbitrary, capricious or an abuse of discretion. Be Mi, Inc. v. S.C. Dep't Rev., 408 S.C. 290, 296, 758 S.E.2d 737, 740 (Ct. App. 2014) (quoting S.C. Code Ann. § 1-23-610(B) (Supp. 2013)). Absent an allegation of fraud or a statute or court rule requiring a higher standard, an administrative law court weighs the preponderance of the evidence. Id. at 297, 758 S.E.2d at 740 (quoting Anonymous (M–156–90) v. State Bd. Med. Exam'rs., 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998)).

[6] These records have been marked CONFIDENTIAL under the ALC's Confidentiality Order.

In a *de novo* contested case, the ALC is the sole finder of fact. Id. (quoting S.C. Dep't Rev. v. Sandalwood Soc. Club, 399 S.C. 267, 279, 731 S.E.2d 330, 337 (Ct. App. 2012)). When evidence conflicts on an issue, the substantial-evidence standard requires deference to the ALC unless its decision is unsupported by substantial evidence or controlled by an error of law. Id. at 297, 758 S.E.2d at 740–41 (citing Risher v. S.C. Dep't Health & Envtl. Control, 393 S.C. 198, 210, 712 S.E.2d 428, 435 (2011); quoting Original Blue Ribbon Taxi Corp. v. S.C. Dep't Motor Vehicles, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008)). Substantial evidence does not foreclose the possibility of drawing another conclusion but is more than a mere scintilla and allows a reasonable mind to reach the same conclusion based on the whole record." Id. at 297–98, 758 S.E. at 740–41 (quoting Risher and Original Blue Ribbon Taxi, supra).

ARGUMENT

The Final Order should be reversed for three reasons. First, the ALC's factual conclusions concerning the suitability of the location are inconsistent with any reasonable view of the record with an absence of evidence in support. As such, those factual findings are not entitled to deference and fall short of the substantial-evidence standard that applies to a contested factual issue. Second, the ALC's understanding of suitability fails to recognize that the doctrine concerns the enterprise's impact on the surrounding community. This means an applicant need not be a bad actor (that is another consideration altogether); it is enough that harms of on-premise consumption are already being felt by the surrounding community. Third, the ALC was wrong to exclude evidence concerning whether Group Therapy meets the constitutional meal standard and to hold that Appellants were unable to raise it as grounds to protest re-licensure. These arguments are considered in turn.

I. The proposed location is unsuitable for on-premises alcohol consumption.

Group Therapy is unsuitable for permitting and licensure because it burdens local law enforcement with public safety concerns, causes congregating and loitering, and contributes to the lawless atmosphere in Five Points that interferes with the peace and enjoyment of surrounding neighborhoods. The suitability of a proposed location is a proper consideration for an ALC to review before granting a permit or license. See S.C. Code Ann. §§ 61-4-520, 61-6-120 & -1820; see also Schudel v. S.C. ABC Comm'n, 276 S.C. 138, 276 S.E.2d 308 (1981). "Proper location" is not statutorily defined, Fast Stops, Inc. v. Ingram, 276 S.C. 593, 595, 281 S.E.2d 118, 120 (1981), but a court may consider any evidence that shows adverse circumstances of the location. Kearney v. Allen, 287 S.C. 324, 326, 338 S.E.2d 335, 337 (1985), holding modified by State v. Cooper, 342 S.C. 389, 536 S.E.2d 870 (2000). Unlike criteria focused on the applicant, suitability of location requires an ALC to consider the public's interest based on the myriad of factors that might weigh on it. A license may be refused on grounds that the location "would adversely affect the public interest, that the nature of the neighborhood and … premises is such that the establishment would be detrimental to the welfare … of the inhabitants, or … the manner of conducting the establishment would not be conducive to the general welfare of the community." 48 C.J.S. Intoxicating Liquors § 196 (Sept. 2016 update). Thus, an applicant need not be found to have acted lawlessly or immorally; a license can be denied based solely on the unsuitability of the location. See, e.g., Schudel, 276 S.C. at 140–41, 276 S.E.2d at 309 (denial based on prior disturbances, proximity to children, and objections by law enforcement, church, and residents); Terry v. Pratt, 258 S.C. 177, 185, 187 S.E.2d 884, 888 (1972) (inadequate police protection rendered location unsuitable). Accordingly, geography, traffic risks, nature of the business vis-à-vis the neighborhood, community impact, and strain on local law enforcement have all been cited

as proper adverse considerations. See, e.g., Moore v. S.C. ABC Comm'n, 308 S.C. 160, 162, 417 S.E.2d 555, 557 (1992); Byers v. S.C. ABC Comm'n, 305 S.C. 243, 246, 407 S.E.2d 653, 655 (1991); Kearney, 287 S.C. at 326, 338 S.E.2d at 337; Schudel, 276 S.C. at 141–42, 276 S.E.2d at 309–10; Palmer v. S.C. ABC Comm'n, 282 S.C. 246, 249, 317 S.E.2d 476, 478 (Ct. App. 1984); Barfly Enter., LLC v. S.C. Dep't Rev., 13-ALJ-17-0452-CC, 2013 WL 6620406 at *5 (S.C. Admin. Law Ct. 2013); Zodiac Private Club v. S.C. Dep't Rev., 08-ALJ-17-0054-CC, 2008 WL 2300384, at *3–4 (S.C. Admin. Law Ct. 2008).

The ALC understood Appellants' effort to press the suitability argument and what they might need to show to prevail. And while the ALC failed to properly credit the specific evidence of violence and other law enforcement problems emanating from Group Therapy (more on that below), the Final Order mostly captures the essence of Appellants' claim, explaining:

> Protestants contend that the location is unsuitable to have its license renewed because Group Therapy and other establishments in Five Points have caused the hospitality district to become a place where large crowds of young people - many of whom Protestants believe to be underage - drink to excess and congregate and loiter on public sidewalks and streets. Protestants allege the same with regards to other establishments in Five Points, and believe that the high concentration of businesses that serve alcohol in Five Points promotes a culture of overconsumption by students that leads to nuisance behavior in and around the area. Such behavior puts the students' own safety at risk, creates a strain on local law enforcement resources, and disturbs the peace and enjoyment of residents in the surrounding neighborhoods. In essence, Protestants assert there is an overall public safety problem in Five Points and argue that Group Therapy specifically contributes to that problem.

R. App. 4–5. But notwithstanding this summary, the balance of the Final Order set out to dispel and dismiss otherwise uncontradicted evidence that the location was unsuitable because of specific harms tied to Group Therapy and similar ones emanating from Five Points. That approach is incorrect and should not stand here.

a. There is no evidence supporting the conclusion Group Therapy is a suitable location given the uncontradicted record indicating the bar burdens law enforcement, creates nuisances for neighbors, and endangers young people.

The Final Order concludes the location is suitable for permitting and licensure. R. App. 16. This conclusion misconstrues the evidence concerning the bar's burden on law enforcement and ignores other evidence altogether. Instead, the ALC offered a vague, aspirational contention that Group Therapy's continued operation provides some "benefits" to the community and that the court was "attempting to achieve a balance" by approving the application. See R. App. 16. In fact, the ALC's order does yeoman's work attacking Chief Holbrook's credibility and manufacturing a vague new standard for what constitutes a cognizable burden on law enforcement based on conclusions untethered from the facts on the ground as reported by every single witness that testified at the contested case hearing about the conditions in Five Points. As such, the Final Order is an abuse of the ALC's discretion unsupported by substantial evidence.

The single biggest problem with the Final Order is its misapprehension of the evidence presented by law enforcement concerning the bar's burden *on* law enforcement. According to the ALC, Group Therapy imposes no burden on law enforcement because the City of Columbia granted the bar a late-night alcohol permit. See R. App. 14. In the court's view, this presents a "factual inconsistenc[y]" with Chief Holbrook's testimony and "[s]uch markedly opposing positions are troubling." See R. App. 8 & 14 (faulting CPD for "wholly discretionary [late night] permit" to operate). This reasoning unfairly contorts the record.

First, the City of Columbia's late-night license only permits an establishment to remain open past 2:00 a.m. to serve beer and wine, not liquor. R. App. 150–51. As discussed in greater depth below, the on-premises consumption of liquor presents constitutional concerns based on the policy judgment that its public consumption outside of restaurants and hotels gives rise to public

harms. See § II, infra. So, while Group Therapy's late-night license is *an* issue, it is not coextensive with the many other issues predicated on the overconsumption of cheap liquor.

Second, the ALC repeatedly claims that Group Therapy's calls for service volume is "low" but that is *not* what the evidence indicates. CPD's protest indicated it was concerned about a large amount of alcohol related offenses such as fights and civil disturbances through the year. As detailed above, for one 12-month period (July 2018–July 2019), CPD was called to Group Therapy 43 times, with 38 of those calls having a direct nexus to the bar. R. App. 264–65, 273–74. Eleven of those calls were fights or civil disturbances, two for loud noises, nine for fake identifications, five for possession of alcohol under 21, one SLED/DOR violation, and one extend-hours permit violation—i.e., the permit the ALC repeatedly highlighted as evidence Group Therapy is a good actor. See R. App. 273–74. Again, CPD tied *all* of these offenses directly to Group Therapy during the July 2018–July 2019 period. Concerning alcohol-related offenses, Holbrook was unequivocal:

> Q: All right, Chief. So with respect to the data that you looked at prior to protesting Group Therapy, just briefly restate the conclusions the Department came to.
>
> A: It was high call volume and generally related to alcohol-related offenses.
>
> Q: All right. Now, is that specific to this location based on the data?
>
> A: Yes.

R. App. 270. As Holbrook explained, CPD uses its call-for-service data to "make very tough deployment decisions" (R. App. 263), and this testimony is inapposite with the ALC's contention that the number incidents at Group Therapy are "low." They are not.

Looking beyond the data prepared by CPD for its public protest, Appellants subpoenaed additional data indicating there were 19 offenses at Group Therapy's address in 2019 and another 88 on the block where it is located. R. App. 279–80, 479–84. Likewise, in 2018, there were 16

offenses reported at Group Therapy's address, but an additional 58 offenses tied to the block where it resides. R. App. 479–84. The most prevalent offenses include disorderly conduct, underage consumption, underage possession of alcohol, and resisting arrest, just to name a few. See R. App. 479–84. All of this data reflects the general state of Five Points at and around the location, which Holbrook explained draws a predatory element to a young, intoxicated, and vulnerable population leading to theft, simple assaults, aggravated assaults, fights, gunfire, and "general disorder." See R. App. 270–72. Indeed, at one point during the contested case hearing, the ALC seemed to suggest Appellants had persuaded the court that the location and the vicinity around it consumed an inordinate amount of police resources, prompting counsel to stop attempting to introduce new exhibits. See R. App. 285–86 ("THE COURT: That's fine. Let me -- what we're doing here is you're just building on. I mean, what that document shows is what you've already shown me through ample testimony. MR. KENNEY: Your Honor, if you're convinced with ample testimony, then we can move on. That's all --- THE COURT: Yes. Yes. Yes. MR. KENNEY: Those are the magic words to me."). The record is overwhelming both as to Group Therapy specifically and Five Points generally and both are valid suitability considerations.

Third, the ALC reasons that "[a]t best, CPD's inability to determine whether Petitioner's call volume is low, so as to justify a discretionary late-night permit to serve more alcohol, or high, so as to necessitate an absolute denial of alcohol licensure entirely, presents a factual dilemma in this case[,]" (R. App. 14), but this ALC-manufactured "dilemma" overlooks Holbrook's clear explanation addressing this very point.

> Q: Chief, if given what Mr. Sellers said about them receiving an after-hours permit, how do you reconcile that with why you're here today, the Department's protests? Explain that for us.
>
> A: So we've been asked to provide essentially three different formats of data. The extended hours operating permitting process looks at data from a fiscal

> year, July 1 through June 30. What we provided to DOR was from that batch of information. What was -- what we were asked to provide for Group Therapy's was two years of data based on calendar year. And them what Mr. Harpootlian's team requested was five years of data based on calendar year. The -- we use a -- in the late night permitting review, again, we look at the data that we talked about today and what that means to us and we also look at how that compares to other establishments. I can say when we did the analysis with Group Therapy, it was not the highest. It was on par with some other establishments within Five Points. There was a couple other establishments that had some additional call volume and issues at the bar that cause us to deny those late-night permits. And, again, out of fairness, we -- the standard we applied to Group Therapy is the same standard we apply to everybody.

Q: Okay.

THE COURT:

> Now, when you are doing the vetting and you're looking at the data, is it data that's specific to the location that is applying for the late-night permit?

CHIEF HOLBROOK:

> Yes, ma'am.

Q: And, Chief, to follow up on the Court's question, is the data you looked at prior to pursuing this protest also specific to the location?

A: Yes. Some of it was, yes.

R. App. 309–11. In short, CPD did *not* determine Group Therapy's call volume was "low" for the purpose of a late-night license—CPD granted one out of fairness because the volume did not rise to the level of some of its competitors. However, the late-night data preceded and was considered in conjunction with CPD's decision to file a public protest. The ALC's effort to undermine Holbrook's credibility compares apples to oranges and, in light of the above-quoted testimony, reflects a clear abuse of discretion.

The ALC also points to testimony from Holbrook that Five Points has seen a recent decrease in quality-of-life offenses due to the work of CPD in collaboration with business owners,

neighborhood associations, other law enforcement agencies, and USC. See R. App. 8. This claim appears to stem from a question the court asked Holbrook at the conclusion of his testimony, but it misleadingly emphasizes the modest, hard-fought successes law enforcement has won in the hospitality district while omitting his explanation concerning the ongoing problem. See R. App. 305–08 ("… we have seen crime decrease at Five Points across the board in terms of, you know, some of our quality of life offenses. …"). Holbrook concluded that colloquy with the court by emphasizing the ongoing nature of the problem in Five Points:

> But the bottom line is, we have a culture in Five Points of underage young adults that frequent there. But then we have businesses that have a business model of serving underage and over-serving and it creates an incredibly vulnerable population that we're left to police, defend, protect, investigate. And we have -- those resources -- if we had better assistance from our business owners collectively and we did not have to provide the resources, we had more responsible behavior and more responsible management of the businesses, we could direct those resources to other places that are in much greater need of those police resources to protect and preserve life.

R. App. 306–08. Any other claim concerning the state of criminal activity in Five Points is misleading and inaccurate. As explained by Armstead and Drennan, neighborhoods are still suffering from nuisances and crime emanating from Five Points, while general disorder and pandemonium are still present as described by every witness who has spent any time in Five Points. The public/private interventions the ALC touts as grounds for its decision have not kept the chaos at bay, they were prompted in response to it. Citing those efforts as a reason to grant a permit and license here is the equivalent of a patient resuming smoking upon learning his chemotherapy treatment is working.

This manner of reasoning is evidenced elsewhere, like with the ALC's efforts to dispel the fact that violence flows *directly* from Group Therapy. Recall that in its order denying the motion to reopen the record and supplement it with SLED testimony and body camera footage, the ALC

reasoned it was unnecessary because the evidence would be "cumulative" and would "not have any material effect on the outcome of this matter." R. App. 20. But the Final Order ignores the fact that violence flows directly from the bar, attempting to excuse it by reasoning:

> Since taking ownership in June 2016, Taneyhill believes there have been around five fights in the streets abutting Group Therapy. When people are out in the streets, Taneyhill maintained that Group Therapy has no ability to control what goes on and that that responsibility falls to law enforcement. Moreover, it is impossible to identify from which establishment(s) those in the streets are coming and going.

R. App. 4. As an initial matter, this finding does not aid Group Therapy's bid to be found a suitable location—violence prompting a police response is a quintessential suitability consideration. Nevertheless, even if this Court is prepared to credit this sort of apologist reasoning, it is irreconcilable with the 11 fights and civil disturbances CPD tied directly to the bar and the video evidence documenting a street fight spilling out of Group Therapy on the morning of February 29, 2020. Were there any doubt, the ALC could have viewed body camera footage (and this Court should) of SLED agents following the suspected brawlers back into Group Therapy where the fight continued inside the bar. The ALC claimed this evidence was "cumulative" but then purported to find there was no evidence tying this sort of violence to Group Therapy, but that it was "impossible" to determine where it comes from. This reasoning is abusive of the facts and the ALC's otherwise broad discretion.

The ALC was similarly loose with its treatment of other notable facts. For example, the ALC credited Group Therapy for having eleven security cameras (R. App. 3) but gave no weight to Group Therapy's inability to furnish that evidence in discovery. The court acknowledged indicia of a club, like live music and a line that forms outside on the sidewalk (R. App. 3), but made no mention of testimony from law enforcement, a protestant, and a Group Therapy DJ describing large groups congregating, drinking, and dancing. The ALC acknowledged Group Therapy's late-

night clientele "tend[s] to be younger" (R. App. 3) but gave no apparent weight to the public health impact on students. See R. App. 9 (simply referring to evidence of heavy, problematic drinking). The ALC cited evidence that "Taneyhill testified that Group Therapy has been cited once for serving to someone underage" since June 2016 and highlighted the bar's purported use of an ID scanner but gave no weight to evidence from CPD that it has been called to the location on account of fake IDs and underage possession.

A decision of an ALC should not be overturned unless it is unsupported by substantial evidence. Be Mi, 408 S.C. at 297, 758 S.E.2d at 740. Respectfully, the ALC's finding that Group Therapy does not burden law enforcement and create other alcohol-related harms is not merely unsupported, it is contrary to any fair reading of the record and, as such, is an abuse of discretion.

b. The ALC misapprehended the suitability doctrine, which turns on the prospect that an applicant will inflict alcohol-related harms on the community surrounding the proposed location.

The Final Order should also be reversed because it fails to understand or apply suitability precedent that holds a location can be found unsuitable due to actual or anticipated alcohol-related harms in the vicinity of the proposed location. As noted above, suitability analysis looks to the applicant's anticipated impact on the community—it does not require bad conduct by the applicant.

Precedent is clear on this point. For example, in Schudel, the location was held to be unsuitable based on prior disturbances, proximity to children, and objections by law enforcement, church, and residents even though "no formal complaints had been filed against his previous establishment[.]" Schudel, 276 S.C. at 140–41, 276 S.E.2d at 309. In Moore v. S.C. ABC Commission, the Supreme Court affirmed the ABC Commission's decision to deny an application where the commission "sought to balance the respective interests of Moore and the members of the community, and expressed the opinion that the public interest must prevail." 308 S.C. 160,

162, 417 S.E.2d at 557. In that case, the protest was predicated solely on the protest of community members and the location's proximity to a school and church even though the applicant held similar permits for eight other locations and had never been cited for any violation. Id. at 161–62, 417 S.E.2d at 556–57. In Byers v. S.C. ABC Commission, the Court explained that a recent legislative amendment allowed the commission to deny the application based solely on its proximity to church, school, and residences and that the commission need not also concern itself with further considerations such as drag racing or limited police protection. See 305 S.C. at 246, 407 S.E.2d at 655. In Kearney v. Allen, the Court found a "clear" record with "reliable, probative and substantial evidence" supporting denial based on evidence that a country-western lounge-restaurant serving up to 1,000 people would cause nearby residents to suffer noise and inconvenience and that the commission was justified in denying the application based on "the impact of the proposed lounge upon the School, upon the residential character of the surrounding area and upon the traffic congestion potential." See 287 S.C. at 327, 338 S.E.2d at 337. In Palmer v. S.C. ABC Commission, this Court affirmed the commission's order finding the proposed location unsuitable because it was "approximately one (1) mile from … [a] known [ ] source of law enforcement difficulty" and at an intersection that "is a dangerous one, with relatively heavy traffic." 282 S.C. at 248, 317 S.E.2d at 477. Accordingly, geography, traffic risks, nature of the business vis-à-vis the neighborhood, community impact, and strain on local law enforcement have all been cited as proper adverse considerations, and recent precedents from the ALC have cited all of these as legitimate suitability factors. See, e.g., Barfly Enter., 2013 WL at *5; Zodiac Private Club, 2008 WL at *3–4.

All of these considerations are present in this record. Group Therapy burdens law enforcement according to testimony from CPD and SLED, and so much so that Chief Holbrook

filed his own protest in this case. Every witness agrees that late-night Five Points is flooded with thousands of young people consuming alcohol to excess and that these young people disturb local residents with anti-social behavior as they migrate to and from the bars, including Group Therapy. This is not merely the consensus of the witnesses in this record, but the written findings of another member of the ALC. See Five Points Roost, LLC v. S.C. Dep't Rev., 18-ALJ-17-0005-CC, 2018 WL 1724696 (S.C. ALC April 3, 2018) (Durden, J.) (denying permit and license); Rooftop Bar, LLC v. S.C. Dep't Rev., 18-ALJ-17-0002-CC, 2018 WL 4327121 (S.C. ALC Sept. 5, 2018) (Durden, J.) (granting permit & license with conditions, appeal pending). According to DOT, the bar is located on the most dangerous segment of road for pedestrians and bicyclists in the entire State and is less than half a mile from the 10th most dangerous segment of road. And empirical survey evidence collected by USC demonstrates that this debaucherous night life is having a deleterious effect on the wellbeing of its students. None of these suitability factors are given any weight by the Final Order. E.g., R. App. 13 (dismissing the burden on law enforcement as one that "fluctuate[s] greatly" and for which Group Therapy is "just one" establishment responsible) & 14 ("While evidence of the heightened levels of alcohol consumption by USC freshmen … causes the Court concern, those levels cannot be attributed to Group Therapy to form a basis against suitability in this matter."). As the undersigned urged the ALC in summation, other aspects of the statute allow the DOR or the ALC to consider whether Group Therapy complied with criteria or whether Taneyhill has good character, "[b]ut the suitability issue that we are raising requires you to balance the community's interest against this one very narrow special interest." R. App. 472.

Here, the ALC's "balancing" exercise was straightforward and legally flawed. On one side of the scale, all the evidence Appellants presented, including damning concessions from Taneyhill himself, received no weight. On the other side, the ALC cited Five Points' celebrating 100 years

as a hospitality district, Taneyhill's purported cooperation mitigating threats his bar was responsible for creating, and his purported willingness to meet with neighbors (R. App. 16)—all speculative and illusory "facts." Indeed, perhaps no single sentence in the Final Order captures the ALC's misapprehension of its role here quite like its conclusion concerning the relationship between the acknowledged student harms from alcohol in Five Points and Group Therapy, writing: "As a single establishment in a hospitality district seeking renewal of an alcohol permit, Group Therapy cannot be held accountable for the behavior or tendencies of a generation." R. App. 14. The same could be said for any one of the suitability precedents above as grounds to dismiss concerns over crime, traffic, proximity to children, etc.—no one establishment can be held accountable for behavior in the community. And yet, that is precisely what suitability analysis requires a court to consider: impact on the community. In this State, alcohol licenses are not a right, they are a privilege and the property of DOR. Because of this fact, the State can and always has considered community impact during permitting and licensing. To hold otherwise is to render suitability analysis a dead letter. That is precisely what the Final Order does here, and it is incorrect as a matter of law.

* * *

For the reasons above, the Court should hold that suitability analysis turns on the prospective impact on the community at large and then conclude that there is overwhelming and uncontradicted evidence that Group Therapy has such a deleterious effect on the Columbia community in and surrounding Five Points.

II. Protestants are entitled to raise *any* grounds for denying a permit or license, including a claim that the applicant is constitutionally ineligible under Article VIII-A, § 1 of the South Carolina Constitution.

The ALC also erred in refusing to consider Appellants' argument that Group Therapy is constitutionally ineligible to receive a license because it is not primarily and substantially engaged in the preparation and service of meals, and in doing so by simply excluding that evidence instead of reaching the merits of Appellants' claim. The ALC's reasoning for this approach is fully set forth in two places. The morning of the contested case hearing, the court explained:

> … I just find that is an enforcement argument. And I think enforcement is the responsibility of the Department and SLED and that the citizens, while it's -- you know, in this instance it concerns me that I don't think that SLED and the Department are adequately fulfilling their role. But the citizens don't have that private right to bring an enforcement action. I think the Sandalwood case is pretty clear on that.

R. App. 61. In the Final Order, it relegated its rationale to a footnote that also relies on Sandalwood. R. App. 5 n.3. This is error.

State law grants residents living in proximity to a proposed location a statutory right to protest an applicant and raise *any* reason for denying a license. Appellants did precisely here that by challenging the suitability of the location *and* the constitutional eligibility of Group Therapy under Article VIII-A, § 1 of the South Carolina Constitution. In deciding to exclude evidence concerning meals and whether Group Therapy is, in fact, primarily and substantially engaged in the preparation and service of meals—all evidence suggests otherwise—the ALC ignored a clear statutory right that entitled Appellants to be heard on that issue and present evidence in furtherance of it. Likewise, the ALC misconstrued Appellants' claim by analogizing their public protest during a re-licensure proceeding as an "enforcement" action that precedent relegates to the State once a license is issued. In doing so, the ALC denied Appellants their statutory right to be heard on this issue and misapplied Sandalwood, errors that warrant correction here.

a. The Constitution prohibits public saloons from obtaining licenses to sell liquor by the drink.

The South Carolina Constitution imposes a certain, non-negotiable regulatory floor on the types of establishments eligible to receive a license to sell liquor by the drink. Licenses for on-premises consumption are only permitted to issue to businesses "which engage primarily and substantially in the preparation and serving of meals[.]" S.C. CONST. art. VIII-A, § 1. The purpose of this constitutionalized regulation of liquor is "to prevent the return of the public saloon and barroom." See Re: No. 5, Alcoholic Liquors, Op. No. 3277, 1972 S.C. Op. Att'y Gen. 79 (1972) (quotations omitted).[7] In this State (and others) post-Prohibition policy has mitigated in favor of greater liberalization in the public consumption of alcohol *except* as to the public saloon.[8] Thus, when South Carolina voters constitutionalized the regulation of liquor—amending what has become Article VIII-A to allow the sale of mini-bottles[9] and (eventually) liquor by the drink—the amendment included the proscription that:

> However, licenses may be granted to sell and consume alcoholic liquors and beverages on the premises of businesses *which engage primarily and substantially in the preparation and serving of meals or furnishing of lodging* or on the premises of certain nonprofit organizations with limited membership not open to the general public, during such hours as the General Assembly may provide.

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[7] The Attorney General's opinion cites Hammond v. McDonald, 49 Cal. App. 2d 671, 89 P. 2d 407, 411 (1939). In Hammond, the "public saloon" or "barroom" disallowed by the primary and substantial requirement was defined as any bar, counter, or other structure over which beverages of an alcoholic content in excess of four per cent by weight were sold or served by the drink to the public for consumption on the premises, but did *not* include bars or counters used to sell, serve, and consume meals. Hammond, 49 Cal. App. 2d at 676, 122 P.2d 332, disapproved of by Covert v. State Bd. of Equalization, 29 Cal. 2d 125, 173 P.2d 545 (1946).

[8] For levity on the complex balance between prohibition and liberalization, counsel commends the comments of the former state Senator from Clarendon County, the Honorable John C. Land, III, delivered on November 26, 2012 on the floor of the South Carolina Senate. Available at: https://www.youtube.com/watch?v=xD9lkUbwWMo.

[9] See S.C. Code Ann. § 61-5-20(4)(a) (Supp. 1973) (authorizing on-premises mini-bottle sales and consumption by a business "bona fide engaged primarily and substantially in the preparation and serving of meals…"), repealed and re-codified by Act 415 (S.B. No. 1084), 1996 S.C. Acts 2458.

S.C. CONST., art. VIII-A § 1 (emphasis added) (1972 (57) 3189; 1973 (58) 146; 1973 (58) 865; 1975 (59) 35; 2005 Act No. 19); see also S.C. CONST. art. VIII (1895) (same). Thus, the public saloon has long been an illegal business enterprise in this State because it has long been understood to invite public intoxication and civil unrest.

Group Therapy is the modern iteration of the public saloon—it is a large open space where large groups of people gather to drink inexpensive liquor to excess. It causes all the public harms that Article VIII-A, § 1 was intended to prevent. It causes a large number of intoxicated people to congregate, leading to fights, disorderly conduct, and soft marks for hard criminals. It burdens police services. It disrupts the peace and enjoyment of neighbors. By limiting licenses to sell liquor for on-premises consumption to restaurants (and hotels and certain non-profits), the Constitution renders a judgment that on-premises liquor consumption should occur where meals are prepared and served as a means of mitigating the public harms that might otherwise predictably flow. It is a rational policy judgment, and whether we believe it remains sound policy or not (Appellants believe it is), it is the law of this State until the people see fit to amend the Constitution.

Appellants read Article VIII-A, § 1 to impose a qualitative and quantitative standard that asks whether an enterprise is primarily engaged in the business of preparing and serving meals, and substantially engaged in doing so. In Brunswick Capitol Lanes v. S.C. ABC Commission, the Court construed a statute[10] with nearly identical language and held a bowling alley that derived just 10 percent of its revenue from the preparation and service of meals fell short of the primary and substantial requirement. 273 S.C. 782, 783–84, 260 S.E.2d 452, 453 (1979). Not surprisingly, a bowling alley might reasonably be thought to *primarily* be engaged in the business of bowling, not meals. Indeed, the Court explained "primarily" means "of first importance" or

[10] S.C. Code Ann. § 61-5-20(4) (1976).

"principally." Id. at 783–84, 260 S.E.2d at 453. Likewise, it rejected the bowling alley's argument that its Class A restaurant license and seating capacity for 52 people deemed it a restaurant. Id. at 783–84, 260 S.E.2d at 453. And the Court looked to gross receipts from food and non-alcoholic beverages as a percentage of overall sales and found that 10 percent revenue from food was insufficient to meet the primarily and substantially standard. Id. Thus, Brunswick explains that the primary-and-substantial requirement is qualitative and quantitative one. The Attorney General agrees, reasoning that, for a business to satisfy the definition, it "not only must it possess the food, material, personnel and facilities for providing meals, but the preparing and serving of meals, when and as ordered by customers, must be essentially *its main purpose and business* and the providing of accommodations for the possession and consumption of alcoholic liquors a secondary and incidental feature." 1972 S.C. Op. Att'y Gen. 79 (emphasis added).

Here, there is ample reason to believe the evidence at trial would have shown Group Therapy to be a public saloon and therefore constitutionally ineligible for licensure. Like the bowling alley, it is a large space with more than enough seating to meet the statutory 40-person requirement. But even if its POS records are to be believed, food sales, at most, comprise 13 percent of gross receipts, while the overwhelming profit and number of sales come from the sale of liquor. And there *is* reason to question the validity of these records. Taneyhill testified during his deposition that he keeps an entirely separate set of paper books that have never been produced. See R. App. 616, 662, 666–70. Likewise, the bar failed to produce video surveillance during discovery, but suffered no spoliation consequence for it after the ALC excluded meal-related evidence. The only people to testify about visiting Group Therapy never saw anyone sitting and eating a meal—they witnessed people drinking, socializing, and dancing. There is no evidence in the record that Group Therapy's primary business is preparing and selling meals *or* that it is

substantially engaged in doing so, but Appellants never had an opportunity to present that case before the ALC short circuited that inquiry and excluded meal-related evidence.

b. Subsequent statutory enactments by the legislature cannot lower the regulatory floor below what the Constitution allows.

Below, Group Therapy argued food sales are immaterial because South Carolina Code § 61-6-20(2), "which codified the definition for the constitutional requirement" effectively abrogated Brunswick. See R. App. 608–09. In the bar's view, Article VIII-A, § 1 "vests the General Assembly with the right to regulate the sale of alcoholic liquors within the State[,]" so the absence of a statutory food requirement excuses Group Therapy from making any showing it is primarily and substantially engaged in the preparation and service of meals. See R. App. 610. The bar is mistaken. While the statute construed in Brunswick has since been modified by the legislature, the adoption of additional statutory criteria does and cannot alter the regulatory floor imposed by Article VIII-A, § 1 for two reasons.

First, even if it wanted to, the legislature could not abrogate or overrule a validly enacted constitutional amendment. Constitutional interpretation "is guided by the principle that both the citizenry and the General Assembly have worked to create the governing law." State v. Long, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014) (citing Miller v. Farr, 243 S.C. 342, 346, 133 S.E.2d 838, 841 (1963) for the proposition that the Constitution "is construed in light of the intent of its framers and the people who adopted it"). Accordingly, "[t]he provisions of the state constitution are not a grant but *a limitation* of legislative power, so that the Legislature may enact any law not expressly, or by clear implication, prohibited by the state or federal constitution." Segars-Andrews v. Judicial Merit Selection Comm'n, 387 S.C. 109, 118, 691 S.E.2d 453, 458 (2010) (emphasis added) (citing Moseley v. Welch, 209 S.C. 19, 39 S.E.2d 133 (1946)). So, while the General Assembly has an "especially broad" power to regulate alcohol (see Retail Servs. & Sys., Inc. v.

S.C. Dep't Rev., 419 S.C. 469, 473, 799 S.E.2d 665, 667 (2017)), and it has exercised that power by adding conditions for licensure, those additional statutory regulations do not supplant the limits imposed by the Constitution. Article VIII-A § 1 is an express limitation on legislative power that must be given effect separate and independent of any law passed by the General Assembly. Put differently, the legislature has *almost* plenary power to regulate alcohol, but that power is not absolute and cannot be exercised in contravention of the Constitution.

Were there any doubt that the Constitution imposes a limit on the legislature's plenary power over the regulation of alcohol, the General Assembly has acknowledged as much as recently as 2018, when it passed Act No. 147, finding and declaring that:

> The state's police power to regulate the business of retail liquor sales in the manner and *to the extent allowed by law including, but not limited to, Section 1, Article VIII–A of the South Carolina Constitution, 1895*, includes regulating the number and localities of retail dealer licenses that a person may be issued and regulating what wholesalers may deliver to persons licensed to sell alcoholic liquors for on-premises consumption, processes that affect the health, safety, and morals of the State.

2018 S.C. Laws Act No. 147 (H.4729), § 1(B) (emphasis added). While Act 147 concerned retail liquor sales, not on-premises consumption, the General Assembly's findings preceding the act include this express recognition that, with respect to alcohol, the legislature's power has been limited by the People's adoption of Article VIII-A, § 1. Simply put, the Constitution establishes a regulatory floor while granting the legislature power to regulate up to the ceiling.

Second, any ABL statute must be read to impose requirements *in excess of* the constitutional minimum, not as a substitute for it. For example, South Carolina Code § 61-6-1610, concerning licensure of "Food-service establishments or places of lodging[,]" provides hours for the sale of liquor for on-premises consumption if:

> (1) the business is bona fide engaged primarily and substantially in the preparation and serving of meals or furnishing of lodging; and

> (2) the business has a license from the department authorizing the sale and consumption of alcoholic liquors by the drink, which is displayed conspicuously on the main entrance to the premises and clearly visible from the outside.

S.C. Code Ann. § 61-6-1610(A). Subsection (2)—requiring a license displayed conspicuously—is an example of a permissible regulation *in addition to* what the Constitution requires.

Group Therapy places great emphasis on South Carolina Code § 61-6-20(2), defining "[b]ona fide engaged primarily and substantially in the preparation and serving of meals" as a business with (1) seating for 40 people at tables, (2) a kitchen, (3) menus, and (4) hot meals prepared for service on demand to customers. S.C. Code Ann. § 61-6-20(2); see also id. §§ 61-6-1610(I)(1)–(3) (defining kitchen, meal, and bona fide). The bar would have the Court hold that so long as these technical requirements are met, there is no food-sales requirement in conjunction with licensure. That is not correct.

The proper way to read the statutory scheme is as a supplement to (not a substitute for) the constitutional requirement. Notably, the statutory requirements include a term the Constitution does not: bona fide. See S.C. Code Ann. § 61-6-1610(I)(3) ("Bona fide engaged primarily and substantially in the preparation and serving of meals" means …"). This distinction should be read to have real meaning as an effort by the legislature to provide guidance when restaurant indicia might understandably be lacking—i.e., like when an applicant first applies for a license. The term "bona fide" simply means in good faith.[11] With a first-time applicant, there will not be any sales data or other evidence of the applicant's business practices to discern whether it is, in fact, primarily engaged in the preparation and service of meals and substantially engaged in doing so.

[11] BONA FIDE, Black's Law Dictionary (10th ed. 2014).

Thus, the checklist imposed by statute simply adds regulatory requirements and helps guide DOR's determination by establishing indicia of a good-faith engagement in the restaurant business. What does *not* happen, is an actual inquiry into the nature of the enterprise. See R. App. 54–55 (DOR conceding to the ALC it does not make an inquiry into whether an enterprise is primarily and substantially engaged in meal preparation and service, explaining "we are going off of strictly what is in the statute."). These statutory criteria (and others) may prove particularly useful when assessing *new* applicants without a proven history. But, simply owning restaurant equipment or meeting other statutory requirements is not, in itself, enough. Cf. Brunswick, 273 S.C. at 783–84, 260 S.E.2d at 453 (possessing restaurant license not dispositive). Criteria that evidences restaurant activity does not foreclose a finding that the enterprise is not, in fact, in the business of preparing and selling meals, particularly where owning restaurant equipment, printing menus (see S.C. Code Ann. Regs. 7-401.3), and providing sufficient seating is treated as a necessary obstacle to overcome to obtain a lucrative liquor license. Cf. Covert v. State Bd. of Equalization, 29 Cal. 2d 125, 134, 173 P.2d 545 (1946) ("It is true, of course, that a restaurant would not be bona fide if it were created or operated as a mere subterfuge in order to obtain the right to sell liquor."). But it is precisely this perfunctory, check-list approach to liquor regulation that has led to a proliferation of illegal alcohol enterprises like Group Therapy in Five Points. Indeed, even the ALC agrees on this point, admonishing "it concerns me that I don't think that SLED and the Department are adequately fulfilling their role." R. App. 61. The ALC is right and, had Appellants been permitted to call DOR's licensure supervisor Young, she would have testified that licensure turns on the statutory checklist, not a substantive inquiry into the nature of the enterprise.

So, while the legislature is certainly free to regulate the licensure of liquor up to the ceiling, it cannot create a scheme that falls below the constitutional floor. The statutory requirements in

Title 61 are properly read as in addition to the primary-and-substantial requirement, meaning their existence does not obviate the importance of that standard.

c. The public protest statute allows Appellants to challenge Group Therapy's constitutional eligibility to obtain a liquor license.

Group Therapy argued, and the ALC agreed, that South Carolina Code § 61-2-20[12] and Sandalwood prevent a public protestant from challenging an applicant's constitutional eligibility to receive a liquor license for on-premises consumption because alcohol enforcement authority is vested with DOR and SLED. See R. App. 5 n.3 & 606–08. That view is flawed because it is irreconcilable with a licensure and permitting scheme that expressly creates a role for members of the public to raise any reason for denying a license before it is issued or re-issued. Nevertheless, the ALC credited this view which, if allowed to stand, will dramatically curtail public protestant rights under the State's alcohol beverage licensing (ABL) laws and risk rendering them a nullity.

The statutory scheme here is clear—the public has an express, statutory right to present reasons why a permit or license should be denied. When an applicant seeks a beer-and-wine permit or liquor license for on-premises consumption, a person residing in the county or within five miles of the location "may protest the issuance or renewal of the license if he files a written protests providing: … (3) the specific *reasons* why the application should be denied[.]" S.C. Code Ann. § 61-6-1825(A) (emphasis added). "Upon the written request of a person who resides in the county where the license is requested to be issued, the department must not issue the permanent license until interested persons have been given an opportunity to be heard." Id. § 61-6-1820. The same statutory protest scheme applies to retail license applications and renewals. See S.C. Code Ann.

[12] See also S.C. Code Ann. § 61-2-80 (providing that DOR "is the sole and exclusive authority empowered to regulate the operation of all locations authorized to sell beer, wine, or alcoholic liquors," and is authorized to impose conditions or restrictions prior to issuing or renewing a license or permit).

§§ 61-4-525 (beer-and-wine permit) & 61-6-1825 (liquor license). Notably, § 61-6-1825 does not contain *any* limiting language restricting the "reasons" a public protestant may cite as grounds for denial, nor does it retain with DOR certain legal prerogatives that the department alone may vindicate. To the contrary, the statute provides that *any* timely filed protest on which the protestant wishes to be heard means "the department must not issue the permanent license but must forward the file to the Administrative Law Court." S.C. Code Ann. § 61-6-1825(B). In other words, a timely protest is presumptively valid, at least for the purpose of referring the matter to the ALC to allow the protestants an opportunity to be heard. For example, in Be Mi,, the ALC considered a homeowners' association's challenge to a license under the theory that the applicant lacked statutorily required seating. 408 S.C. at 293, 758 S.E.2d at 738. While that argument failed on the facts, there was no question whether the homeowners' association had standing to raise it as grounds for denying the license. No statute or precedent stands for the proposition that the "reasons" a protestant might cite as grounds for denial are limited to certain issues. Group Therapy and the ALC fail to cite any such authority.

However, once a license or permit is issued, South Carolina Code § 61-2-80 reserves all legal authority to regulate and enforce against the licensed or permitted entity with DOR. *That* is the proposition for which Sandalwood stands. E.g., Sandalwood, 399 S.C. at 281, 731 S.E.2d at 337 (criticizing reliance on third-party testimony to substantiate DOR's citation). And Appellants have no quarrel with Sandalwood or the proposition that enforcement matters must be left to DOR and SLED. Cf. R. App. 37–38 (arguing if the ALC granted the license and permit, "then the public would be closed out for that two-year period…. But this is under the public protest statute. This is our opportunity to raise reasons."). But the ALC's decision here simply labeled Appellants' constitutional argument and "enforcement matter" and used that conclusion as grounds to exclude

otherwise probative evidence. Under the ALC's reasoning, public protestants apparently can only raise suitability arguments, nothing more. But there is no authority for the position, nor does that reasoning have any limit. Indeed, the ALC's reasoning could be equally applied to conclude Appellants' suitability arguments are also "enforcement" claims and then dismiss on that basis.

The better view, and the view that is faithful to the language of protest statutes, is that state law distinguishes between application/re-application periods and post-licensure enforcement. During the former, § 61-6-1825 grants the public an express right to be heard to raise *any* issue that might be grounds for denying a license. Once a license is issued, § 61-2-80 reserves all legal authority to regulate and enforce against the licensed entity with DOR and SLED. The ALC's ill-defined view frustrates the very procedure designed to give the public a role in licensure proceedings and it should not stand.

* * *

The ALC was incorrect to conclude that Appellants' constitutional arguments were an "enforcement" matter. That conclusion is contrary to statute. Moreover, even if the ALC was skeptical as to Appellants' constitutional argument, it was incorrect to short circuit that inquiry. Precedent holds it is improper to resolve novel questions of law when a claim turns on the underlying facts. E.g., Palmer v. State, 427 S.C. 36, 43, 829 S.E.2d 255, 259 (Ct. App. 2019). By excluding Appellants' evidence concerning Group Therapy's meal preparation and service (or lack thereof) the ALC has effectively granted dismissal without affording Appellants an opportunity to develop the record to support their theory while offering only the most superficial reasoning in support of that decision. This Court should hold that to be an error warranting reversal.

CONCLUSION

Here, neighbors, local law enforcement, and the State's largest university sought assistance from the ALC based on specific, competent evidence that the applicant undermines public safety and contributes to an ongoing nuisance and public health crisis in the Columbia community. The ALC ignored that evidence and misapplied the law. For the reasons set forth above, the Final Order should be reversed.

Respectfully submitted,

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March 29, 2021
Columbia, South Carolina.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the
ADMINISTRATIVE LAW COURT
The Honorably Shirley C. Robinson

Appellate Case No. 2020-000837
Case No. 19-ALJ-17-0001-CC

Eighteen Ink, LLC, d/b/a Group Therapy.....Respondent,

v.

South Carolina Department of Revenue.....Respondent,

and

Thomas R. Gottshall, April C. Lucas, Michael Drennan.....Intervenors, Appellants.

CERTIFICATION OF COUNSEL

The undersigned certifies that the Final Brief of Intervenors, Appellants Thomas R. Gottshall, April C. Lucas and Michael Drennan filed on March 29, 2021, complies with Rule 211(b), SCACR.

[signature page to follow]

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